Supreme Court, U.S.
041235 MAR 11 2005

No. 04-

IN THE

Supreme Court of the United States

DARRYL TOLBERT,

Petitioner,

v.

THE ESTATE OF ANNA JANE KEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS SUBMITTED FOR REVIEW

- Whether *Silver v. Silver*, 280 US 117, 50 S. Ct. 57 (1929) is binding precedent as to whether state guest statutes which distinguish between passengers and guests for liability purposes do not violate the Equal Protection Clause of the 14th Amendment or whether the case should be overruled.

- Whether the Alabama Guest Statute violates the Equal Protection Clause of the 14th Amendment of the U.S. Constitution.

- Whether the Alabama Guest Statute violates the Equal Protection Clause of the 14th Amendment as applied to a 14 year old passenger in a car driven by a caregiver when the caregiver negligently operated a vehicle resulting in the death of the minor.

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OPINIONS BELOW AND STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Darryl Tolbert petitions for a Writ of Certiorari to review the opinion of the Alabama Supreme Court regarding the Alabama Guest Statute issued on 10/8/04, *Tolbert v. Estate of Anna Jane Key* 2004 WL 2260379 Ala. The Application for Rehearing was denied on 12/17/04.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Alabama Guest Statute

> The owner, operator or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a **guest**[1] while being transported without payment thereof in or upon said motor vehicle, resulting from the operation thereof, unless such injuries or death are caused by the willful or wanton misconduct of such operator, owner or person responsible for the operation of said motor vehicle.

Ala. Code § 32-1-2 (1975), enacted 1935.

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[1] The term "guest" is undefined in the statute.

14th Amendment – U.S. Constitution

§ 1. Rights of citizens; states not to abridge or deny.

> No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

14th Amendment to the U.S. Constitution.

STATEMENT OF FACTS

1. Anna Key, the grandmother of Steven Tolbert a 14 year old minor, cared for Steven during the day. She was Steven's primary caregiver.

2. On 7/25/01, Anna Key accompanied by Steven Tolbert drove Chris Givens, a minor, home.

3. On a sharp downhill double "S" curve, Anna Key lost control of her vehicle which slid into the opposing lane of traffic and collided with an oncoming vehicle, resulting in the death of Steven Tolbert, Anna Key, and the driver of a vehicle in the oncoming lane of traffic.

4. State Troopers who investigated the accident concluded that Ms. Key's "driving was improper for the conditions."

5. The Circuit Court in Alabama granted Summary Judgment to the Estate on all claims including negligence, negligent supervision, and wantonness on the basis of the Alabama Guest Statute.

6. Tolbert challenged the Constitutionality of the Alabama Guest Statue at the trial level:

> At a point in the proceedings, Darryl filed a "Constitutional Challenge of the Guest Statute"

(Westlaw Opinion, p. 4 of 13)

> Darryl contended that the guest statute violates §§ 13 and 22 of the Alabama Constitution and **Amendment 14 of the United States Constitution**.

(Westlaw Opinion, p. 4 of 13)

7. On appeal, Tolbert again challenged the constitutionality of the Alabama Guest Statute based on the Equal Protection Clause of the Fourteenth Amendment and on state constitutional grounds.

8. In upholding the Alabama Guest Statute, the Alabama Supreme Court noted the binding effect of *Silver*:

> In *Silver v. Silver*, 280 U.S. 117, 50 S. Ct. 57, 74 L. Ed 221 (1929), the Supreme Court "found a rational distinction between gratuitous passengers in automobiles and guests in other modes of transportation."[2]

(Westlaw Opinion p. 5 of 13)

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[2] The Court acknowledged, without deciding, that a dispute existed as to whether the Alabama Constitution provided Equal Protection:

> The question whether §§ 1, 6, and 22 of Article I, Constitution of Alabama 1901, combine to guarantee the

(Cont'd)

9. Tolbert raised the Equal Protection issue again on Application for Rehearing, which the Alabama Supreme Court denied without opinion on 12/17/04.

REASONS FOR GRANTING THE PETITION

1. A split of decisions exists among the highest Appellate Courts of the states as to whether the 1929 *Silver* decision is binding precedent for holding that a state Guest Statute which creates a legislative distinction between passengers and guests for liability purposes does not violate the Equal Protection Clause of the 14th Amendment. Three Circuit Court of Appeals have held that *Silver* is binding precedent on the issue.

2. The Alabama Supreme Court held that the *Silver* decision was still valid precedent.

> In *Silver v. Silver*, 280 U.S. 117, 50 S. Ct. 57, 74 L. Ed 221 (1929), the Supreme Court "found a rational distinction between gratuitous passengers in automobiles and guests in other modes of transportation."[3]

(Westlaw Opinion p. 5 of 13)

(Cont'd)

> citizens of Alabama equal protection under the laws remains in dispute. See *Black v. Pike County Comm'n*, 360 So.2d 303 (Ala. 1978); *Ex parte Jackson*, 516 SO.2d 768 (Ala. 1986), and *Ex Parte Branch*, 526 So.2d 609 (Ala. 1987) (implying that those provisions do provide for equal protection); but see *Ex parte Merlo*, 735 So.2d 1172 (Ala. 1999).

(Opinion, p. 12)

[3] The Court acknowledged, without deciding, that a dispute (Cont'd)

3. Fourteen other state appellate courts have agreed that *Silver* is binding on the issue of equal protection under the 14th Amendment including Arkansas[4], Delaware[5],

(Cont'd)
existed as to whether the Alabama Constitution provided Equal Protection:

> The question whether §§ 1, 6, and 22 of Article I, Constitution of Alabama 1901, combine to guarantee the citizens of Alabama equal protection under the laws remains in dispute. See *Black v. Pike County Comm'n*, 360 So.2d 303 (Ala. 1978); *Ex parte Jackson*, 516 SO.2d 768 (Ala. 1986), and *Ex Parte Branch*, 526 So.2d 609 (Ala. 1987) (implying that those provisions do provide for equal protection); but see *Ex parte Merlo*, 735 So.2d 1172 (Ala. 1999).

(Westlaw Opinion, p. 5 of 13)

[4] *White v. Hughes*, 257 Ark. 627, 628, 519 S.W. 2d 70, 71 (1975) ". . . if the rule of *Silver v. Silver supra*, the highest authority on the equal protection clause, 'is to be changed and the strictures of the Fourteenth Amendment extended in this area of the law, **we shall await the views of the United States Supreme Court on the subject**."

Davis v. Cox, 593 S.W. 2d 180 (Ark. 1980) ". . . the Arkansas guest statute is not contrary to the Fourteenth Amendment to the United States Constitution."

[5] *Justice v. Gatchell*, 325 A.2d 97 (Del.1974).

Pierce v. Bierer, 447 A.2d 1189 (Del. 1982) ". . . we find it significant that *Silver*, decided in 1929, still remains the last word by the U.S. Supreme Court on Automobile Guest Statutes in relation to equal protection rights."

Iowa[6], Kentucky[7], Michigan[8], Texas[9], Utah[10], Wyoming[11], North Dakota[12], Oregon[13], Indiana[14], South Dakota[15], Colorado[16] and Illinois[17]. The highest appellate courts of most of the above states have held that the state Guest Statutes are

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[6] *Keasling v. Thompson*, 217 N.W. 2d 687 (Iowa 1974).

Bierkamp v. Rogers, 293 N.W. 2d 577 (Iowa 1980) "Due to the aforementioned recent rulings of the United States Supreme Court dismissing guest statutes appeals for want of a substantial federal question, *Silver v. Silver* remains a dispositive of federal constitutional grounds."

[7] *Ludwig v. Johnson*, 243 Ky. 534, 49 S.W.2d 347 (1932).

[8] *Manistee Bank and Trust Co. v. McGowan*, 394 Mich. 655, 232 N.Ws. 2d 636 (1975).

[9] *White v. Hughes*, 257 Ark. 627, 519 S.W.2d 70 (1975).

[10] *Cannon v. Oviatt*, 520 P.2d 883 (Utah 1974) (citing *Silver).*

[11] *Nehring v. Russell*, 582 P.2d 67 (Wy. 1978).

[12] *Johnson v. Hassett*, 217 N.W. 2d 771 (N.D. 1974).

[13] *Duerst v. Limbocker*, 525 P.2d 99 (Or. 1974).

[14] *Sidle v. Majors*, 341 N.E. 2d 763 (Ind. 1976). *Dempsey v. Leanerdt*, 341 N.E.2d 763 (1976).

[15] *Behrns v. Burke*, 229 N.W. 2d 86 (S.D. 1975).

[16] *Richardson v. Hansen*, 527 P.2d 536 (Colo. 1974).

[17] *Delany v. Badame*, 49 Ill.2d 168, 274 N.E. 2d 353 (1971).

unconstitutional on state constitutional grounds. Two of the states, Illinois[18] and Indiana,[19] have significantly limited the Guest Statute by statute.

4. Seven state Appellate Courts including New Mexico[20], Nevada[21], Ohio[22], Idaho[23], Kansas[24], California[25], and South Carolina[26] have struck down Guest Statutes **on Federal Equal Protection grounds**, holding that the ***Silver* case is not binding precedent** on the equal protection issue. State constitutional grounds were also relied upon.

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[18] *Illinois:* Act of July 2, 1931, 1931 Ill. Laws 779 (codified at Ill. Ann. Stat. ch. 95 1/2, §10-201 (Smith-Hurd 1971)) – Amended by Act of Sept. 8, 1971, no. 77-1482, 1971 Ill. Laws 2716 to apply only to hitchhikers.

[19] *Indiana*: Act of Mar. 14, 1929, ch. 201, 1929 Ind. Acts 679 (codified at Ind. Code Ann. § 9-3-3-1 to -2 (Burns 1973)) – Amended by Act of Mar. 1, 1984, P.L. 68-1984, §2, 1984 Ind. Acts 925, 925-26 to apply only to hitchhikers and close relatives of hosts.

[20] *McGeehan v. Bunch*, 88 N.M. 308, 540 P.2d 238 (1975)

[21] *Laakonen v. Eighth Judicial District Court*, 91 Nev. 506, 538 P.2d 574 (1975)

[22] *Primes v. Tyler*, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975)

[23] *Thompson v. Hagan*, 96 Idaho 19, 523 P.2d 1365 (1974)

[24] *Henry v. Bauder*, 213 Kan. 751, 518 P.2d 362 (1974)

[25] *Brown v. Merlo*, 8 Cal.3d 855, 106 Cal. Rptr. 388, 506 P.2d 212 (1973)

[26] *Ramey v. Ramey* 258 SE 2d 883 (S.C. 1979)

5. The decision of the South Carolina Supreme Court in *Ramey v. Ramey* 258 S.E.2d 883 (SC.1979), is representative of the states which have declared that the **Guest Statute violates the Equal Protection Clause of the 14th Amendment** despite the *Silver* decision. The Supreme Court of South Carolina held that ***Silver* was not binding** because the *Silver* Court did not consider the two historical justifications for the Guest Statute and because *Silver* was decided on very narrow issues:

> In *Silver*, the Supreme Court considered whether the Connecticut guest statute impermissibly distinguished gratuitous passengers in automobiles from those in other classes of vehicles. In upholding the statute's constitutionality, the Court stated:
>
> "(I)t is not so evident that no grounds exist for the distinction that we can say a priori that the classification is one forbidden as without basis, and arbitrary.'
>
> The ***Silver* case is distinguishable** as it did not consider the two historical justifications for the guest statute to determine if there was a rational connection between the objectives of the statute and the means provided to accomplish the objectives. Moreover, in Silver, the plaintiff attacked the statute solely on the ground that the distinction drawn between automobile guests and guests in other conveyances was impermissible. In rejecting this limited argument, the Silver Court approached the guest statute simply as one of the many automobile regulatory measures then being

enacted. As noted by the Supreme Court of Idaho in a recent decision rejecting the constitutionality of that state's guest statute:

> 'The Silver case appears to have taken the approach that all regulations of automobiles are constitutional without examining the regulations in detail.' *Thompson v. Hagan*, 96 Idaho 19, 523 P.2d 1365, 1370 (1974).

Our view parallels those of other courts which have held their guest statutes unconstitutional. **The 1929 Silver decision is neither persuasive nor controlling due to its limited scope** . . .

We affirm the trial court's conclusion that Code § 15-1-290 violates the equal protection guarantees of Article I, § 3 of the South Carolina Constitution, **and the Fourteenth Amendment to the United States Constitution** and apply this holding with modified prospectively to all similar pending and future actions.

6. Alabama is the only state in the nation with a "full fledged" Guest Statute.

Of the thirty-three states[27] that had guest laws, **only Alabama retains "its full-fledged version**

Roberts, Cusimano. Alabama Tort Law 5.0, p. 5-2.

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[27] *See* Appendix for a chronological list of Enactment and Subsequent History of Automobile guest Statues.

7. The 7th Circuit Court of Appeals in reviewing the issue regarding the Indiana Guest Statute in *Sidle v. Majors*, 536 F.2d 1156 (7th Cir. 1977), *cert. denied*, 429 U.S. 945 expressed grave doubts about the validity of *Silver*, but was "obligated" to recognize its binding effect:

> Defendant's chief reliance is upon a 1929 Supreme Court decision where, without much discussion, the Court held that a similar Connecticut statute did not contravene the Equal Protection Clause. *Silver v. Silver*, 280 U.S. 117, 50 S. Ct. 57, 74 L. Ed. 221. However, the rule of that case has been so eroded by subsequent decisions (*see, e.g.*, *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed 2d 63) that it should no longer control under the Equal Protection Clause . . .
>
> The premises of *Silver v. Silver*, being no longer valid in the light of modern authority, we believe that on plenary review the Supreme Court would not hold that *Silver* controls the question before us . . .
>
> We can find no necessary rational relation to a legitimate state interest (*Reed v. Reed*, 404 U.S. 71, 75-76, 92 S. Ct. 251, 253-254, 30 L. Ed. 2d 225, 229) that would require us to sustain the legislation . . .
>
> . . . despite our doubts about the current validity of the rule in *Silver v. Silver, supra*, we are obligated to affirm. *Hicks v. Miranda, supra*, 422 U.S. at 345, 95 S. Ct. at 2290, 45 L. Ed. 2d at 236 . . .

> The frequency with which the question has arisen and the disagreement among the courts attest to the importance of the issue, its difficulty and the need for conclusive resolution so that the present viability of *Silver v. Silver*, can be authoritatively determined.

8. The 10th Circuit Court of Appeals in reviewing the Guest Statute of Wyoming in *Neu v. Grant*, 548 F.2d 281, 285 (10th Cir. 1977) expressed doubts regarding the validity of *Silver*, but held it was binding precedent:

> ". . . Therefore, despite our doubts about the current validity of the rule in *Silver v. Silver*, supra, we are obligated to affirm. *Hicks v. Miranda, supra*, 422 U.S. at 345, 95 S. Ct. at 2290, 45 L. Ed. 2d at 236.
>
> Although we are the first court of appeals to consider the equal protection challenge to a guest statute, the high courts of several states have already grappled with the problem, and the split among them has been noted (*supra* p. 1159). Indeed, the Supreme Courts of Nevada and New Mexico invalidated their states' guest statues after the Supreme Court of the United States acted in *Cannon. See Laakonen v. Eighth Judicial District Court*, supra; *McGeehan v. Bunch, supra* (88 N.M. 308, 540 P.2d 238 (1975)). The frequency with which the question has arisen and the disagreement among the high courts of several states attests to the importance of the issue, its difficulty and the need for conclusive resolution

> so that the present viability of *Silver v. Silver* can be authoritatively determined." *Sidle v. Majors*, 536 F.2d 1156 (7th Cir. 1976) at 1160.

9. The 5th Circuit Court of Appeals in *Corey v. Tores*, 650 F.2d 803, 805 (5th Cir. 1981) in reviewing the Georgia Guest Statute stated that the analysis of *Silver* was "antiquated," but "still the law":

> Although the analysis in *Silver* is antiquated an the decision has been subject to criticism by state courts and members of the Supreme Court, it is still the law. More recently, when the Supreme Court was faced with appeals from three state courts challenging similar guest passenger statutes on similar grounds, the Court dismissed the appeals on the ground that they lacked substantial federal questions . . .
>
> . . . until the Supreme Court decides otherwise, we conclude that Georgia's Guest Passenger Rule does not violate the equal protection clause of the Fourteenth Amendment.

10. The only case in which the U.S. Supreme Court addressed the issue of whether state guest statutes violated Equal Protection was in 1929 in *Silver v. Silver*, 280 U.S. 117, 50 S. Ct. 57 (1929) when the Court considered whether the Connecticut Guest Statute impermissibly distinguished gratuitous passengers in automobiles from those in **other classes of vehicles**. In holding that the Connecticut statute did not deny equal protection under the 14th Amendment, the Court **limited its holding** to the **single question** of whether the distinction between gratuitous passengers in

automobiles and those in other classes of vehicles violates equal protection:

> As the record does not disclose the constitutional grounds on which the appellant challenged the validity of the statute, **our review will be limited to the single question** arising under the Federal Constitution which was **considered in the opinion of the court below**...
>
> It is said that the vice in the statute is not that it distinguishes between passengers who pay and those who do not, but between **gratuitous passengers in automobiles and those in other classes of vehicles.** But it is not so evident that no grounds exist for the distinction that we can say a priori that the classification is one forbidden as without basis, and arbitrary. 280 U.S. at 123. *Silver v. Silver,* 280 U.S. 117 (1929).

11. In *Silver* the Supreme Court utilized the **"any conceivable basis test"** in holding that the Guest Statute did not violate the Equal Protection Clause:

> . . . it is not so evident that **no grounds exist** for the distinction that we can say a priori that the classification is one forbidden as without basis, and arbitrary. 280 U.S. at 123. *Silver v. Silver,* 280 U.S. 117 (1929)."

12. The current test for determining whether a legislature distinction violates equal protection is the "rationally related" test:

> Under our **rational basis standard** of review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is **rationally related** to a legitimate state interest." *Cleburne v. Cleburne Living Center*, supra, at 440, 105 S. Ct. 3249; see also *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973); *Romver v. Evans*, 517 U.S. 620, 632-633, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996); *Norlinger v. Hahn*, 505 U.S. 1, 11-12, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992).

Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472 (2003).

13. The Supreme Court has dismissed appeals from Arkansas[28], Indiana[29], Oregon[30], Utah,[31] and Delaware[32]

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[28] *White v. Hughes*, 257 Ark.627, 519 S.W.2d 70, *appeal dismissed*, 423 U.S. 805 (1975)

[29] *Brady v. Acs*, 264 Ind. 285, 342 N.E2d 837, *appeal dismissed*, 429 U.S. 803 (1976)

[30] *Hill v. Garner*, 277 Or. 641, 561 P.2d 1016, *appeal dismissed*, 434 U.S. 989 (1977)

[31] *Cannon v. Oviatt*, 520 P.2d 883 (Utah), *appeal dismissed*, 419 U.S. 810 (1974)

[32] *Pierce v. Bierrer*, 447 A.2d 1189 (Del.), *appeal dismissed*, 459 U.S. 1026 (1982).

upholding guest statutes "for want of a substantial federal question".

14. Because these dismissals are deemed adjudications on the merits and thus binding on lower courts[33], several state and federal courts have concluded that federal equal protection challenges are foreclosed by *Silver's* reasoning.[34]

15. In 1977 Justice White[35] joined by Justice Brennon in a dissenting opinion noted the significant division among the states on *Silver* and stated that the issue of whether *Silver* remained binding precedent on the issue of whether a guest statute violates federal equal protection should be reviewed by the Court:

> In 1929, this Court held that Connecticut's quest statute did not violate the Equal Protection Clause, because it could not be said that "no grounds existed for the distinction" between gratuitous passengers in automobiles and those in other classes of vehicles. *Silver v. Silver* 280 U.S. 117, 123 50 S. Ct. 57, 74 L. Ed. 221 (1929). While

[33] *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975).

[34] *Corey v. Jones*, 650 F.2d 803, 805 (5th Cir. 1981); *Neu v. Grant*, 548 F.2d 281, 285 (10th Cir. 1977); *Sidle v. Majors* 53 F.2d 1156, 1159-60 (7th Cir.), *cert. denied*, 429 U.S. 945 (1976): *Davis v. Cox* 268 Ark. 78, 80, 593 S.W.2d 180, 182 (1980): *Bierkamp v. Rogers*, 293 N.W.2d 577, 579 (Iowa 1980) (striking down the Iowa guest statute on state equal protection grounds); *Nehring v. Russell*, 582 P. 2d 67, 76 (Wyo. 1978) (striking down the Wyoming guest statute on state equal protection grounds).

[35] *Hill v. Garner*, 434 U.S. 989, 98 S. Ct. 623 (1977) and *Sides v. Majors*, 429 U.S. 945 (1978)

that decision for a while foreclosed federal equal protection challenges to the guest statutes of the various states, in recent years the issue of the constitutional validity of these statutes has been frequently litigated in state courts with conflicting results. Since 1971, the highest courts of no fewer that **six states have concluded that their guest statutes violated the Equal Protection Clause of the Fourteenth Amendment**, while during the same period similar statutes have been upheld against federal constitutional attack in 10 states. Typical of those decisions striking down the guest statutes is *Brown v. Merlo*, 8 Cal.3d 855, 106 Cal.Rptr. 388, 506 P.2d 212 (1973), in which the California Supreme Court concluded that the classifications created by the challenged statute between those denied and those permitted recovery for negligently inflicted injuries did not bear a substantial and rational relation to the statute's purposes of protecting the hospitality of the host driver and of preventing collusive lawsuits. *Silver v. Silver* was expressly distinguished involving different equal protection considerations. In contrast, the Oregon Supreme Court, among others, has held that the hospitality rationale does support the distinctions drawn by the State's guest statute. *Duerst v. Limbocker, supra* . . .

Because the significant division among the state courts persists despite *Silver v. Silver, supra*, and despite our more recent relevant dismissals, I would note probable jurisdiction and set this case for oral argument.

Hill v. Garner, 434 U.S. 989 (1977).

16. In 1978, Justice Brennan in dissent in *Sidle v. Majors*, 429 U.S. 945, 97 S. Ct. 366 stated that the Supreme Court should review the Indiana Guest Statute under **current equal protection jurisprudence**:

> This case presents the question whether the Indiana motor vehicle guest statute violates the Equal Protection Clause of the Fourteenth Amendment. Forty-five years ago *Silver v. Silver*, 280 U.S. 117, 50 S. Ct. 57, 74 L. Ed 221 (1929), held that a Connecticut guest statute, providing that no person carried gratuitously as a guest in motor vehicle might recover from the owner or operator for injuries cause by its negligent operation, was not in conflict with the Equal Protection Clause because of the distinction it made between passengers so carried and those in other classes of vehicles. The Court's rationale was that ". . . it is not so evident that no grounds exist for the distinction that we can say a priori that the classification is one forbidden as without basis, and arbitrary." *Id.* at 123, 50 S. Ct. 57. But under today's equal protection jurisprudence the classification **must satisfy the standard of rationality**. . . .
>
> **Within only the past five years, high courts of no less that 17 states have examined or re-examined their automobile guest statutes challenged as denying equal protection, and almost one-half of those courts have struck down their state's statutes as unconstitutional under both the Federal and State Constitutions**. This conflict of view might reasonably lead bench

> and bar to expect that this Court would grant review of a case that afforded an opportunity to re-examine *Silver* in light of today's rationality standard."

17. In this case, the Alabama Supreme Court refused to presume that *Silver* was no longer controlling authority:

> Likewise, the naked statement[36] that "the Guest Statute violates the Equal Protection Clause of the U.S. Constitution," falls far short of demonstrating that we should presume *Silver v. Silver* to no longer be controlling authority.

(Westlaw Opinion, p. 6 of 13)

18. The *Silver* decision is a judicial barrier which prevents the Alabama Supreme Court from deciding whether the Alabama Guest Statute violates the 14th Amendment Equal Protection Clause.[37] The *Silver* decision precluded Tolbert from recovering damages for the death of his son who was killed by a negligent caregiver.

19. The Alabama Supreme Court has previously relied on the *Silver* decision to deny an equal protection

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[36] In the Alabama Supreme Court, Tolbert did not rely on the "naked statement that the Guest Statute violates the Equal Protection Clause." Tolbert argued that the Guest Statute violated the Equal Protection Clause quoting extensively from *Brown v. Merlo*, 506 P.2d 212 (Calif. 1973) and *Whitworth v. Bynum*, 697 S.W. 194 (Texas 1985).

[37] The Alabama Supreme Court has not decided whether the Alabama Constitution provides equal protection. *See* footnote 3.

constitutional challenge to the Alabama Guest Statute in 1939 in *Pickett v. Matthews*, 192 So. 261 (Ala. 1939) and again in 1975 in *Beasley v. Bozeman*, 315 So.2d 570 (Ala. 1975):

> The Supreme Court of the United States has upheld the right of a state to pass a guest law.

See Silver v. Silver, 280 U.S. 117, 50 S. Ct. 57, 74 L. Ed. 221 (1929), 315 So.2d 570.

20. The earlier rationales for the Guest Statute have been rejected because they do not rationally advance the earlier stated objectives of the statutes:

> The rationales commonly cited for guest laws are the promotion of "hospitality" by automobile owners and the prevention of collusion between host and guest to defraud the host's insurer. But as time passed and social values changed, many judges and **legislators realized that guest laws do not rationally advance those objectives** and are not worth their price in compensated injuries. No automobile guest statute has been enacted since 1938.

Goodbye and Good Riddance by James J. Woods, 16 Cumb.L.Rev. Vol. 16, 263-265 (1985-1986).

21. There is no reasonable, rational reason for distinguishing between passengers and guests for liability purposes.

22. The Alabama Guest Statute violates the Equal Protection Clause of the 14th Amendment because there is

no reasonable rational basis for the legislative distinction between "guests" and passengers for liability purposes. All guests and passengers should receive the benefit of the negligent driver's liability insurance[38] when the driver is negligent.

23. In the past 30 years, the U.S. Supreme Court has declared several state laws unconstitutional on Equal Protection grounds. In *Trimble v. Gordon*, 430 U.S. 762, 776, 768, 97 S. Ct. 1459, 1464, 1468 (1977), the U.S. Supreme Court in striking down a state probate statute which allowed children born out of wedlock to inherit only from mothers carefully reviewed the reasons of the statue and **rejected all reasons**:

> . . . the Equal Protection Clause requires more than the mere incantation of a proper state purpose.
>
> For the reasons stated above, we conclude that § 12 of the Illinois Probate Act cannot be squared with the command of the Equal Protection Clause of the Fourteenth Amendment. Accordingly, we reverse the judgment of the Illinois Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

Id. 776.

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[38] Since June 1, 2000 Alabama has had mandatory automobile liability insurance. (AL.ST. § 32-7A-1, 4 (1975)). The Alabama Guest Statute frustrates and contradicts Alabama's financial responsibility laws which are designed to compensate all accident victims and spread the risk of individual losses over the entire motoring population.

24. The Alabama Supreme Court in relying on *Silver* in upholding the Guest Statute did not state any reasons rational or otherwise for the legislative distinction between passengers and guests for liability purposes.

25. More recently the U.S. Supreme Court, in *Lawrence v. Texas*, 539 U.S. 558, 565 123 S. Ct. 2472, 2476 (2003), agreed to review an Equal Protection issue which the Court had relied on 17 years earlier. The issue on review was:

> Whether *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), should be overruled?

26. In overruling *Bowers*, the U.S. Supreme Court held that *stare decisis* is not an inexorable demand especially when reviewing a Constitutional liberty interest:

> The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) ("*Stare decisis* is not an inexorable command; rather it "is a principle of policy and not a mechanical formula of adherence to the latest decision") (quoting *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S. Ct. 444, 84 L. Ed 604 (1940)).
>
> *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick*, should be and is now overruled."

539 U.S. 578, 106 S. Ct. 2489.

> As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Id. 539, 3489.

27. Most legal authorities and three Circuit Courts of Appeals agree that *Silver* is "not valid" and the decision is "antiquated", yet all three Circuit Courts of Appeal held they were obligated to follow *Silver.*

WHEREFORE, Petitioner requests that the Court will grant the Petition for Writ of Certiorari to the Alabama Supreme Court and upon review, declare that the *Silver* decision is no longer binding authority for determining whether the Alabama Guest Statute violates the Equal Protection Clause of the 14th Amendment. Petitioner requests that the Alabama Guest Statute be declared unconstitutional because it violates the Equal Protection Clause of the 14th Amendment of the U.S. Constitution in that there is no rational basis for a legislative distinction between passengers and "guests" for liability purposes. In the alternative, Petitioner requests that the Alabama Guest Statute be declared unconstitutional on equal protection grounds as applied to the facts of this case because the deceased child in this case was in the care of his caregiver.

Respectfully submitted,

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